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IN THE

Supreme Court of the United States

LISA FISHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1346, which expanded the definition of federal fraud to include deprivation of "the intangible right of honest services," violates the Due Process Clause of the Fifth Amendment when used to impose federal criminal penalties on conduct *solely because* the conduct runs afoul of state *civil* conflict of interest statutes.

2. Whether the 1994 amendment to 18 U.S.C. § 1341, which expanded the federal mail fraud statute to include deliveries by private carrier, violates the Commerce Clause and the Tenth Amendment when used to impose federal criminal penalties on purely local conduct that has no connection to interstate commerce other than an *intrastate* mail delivery by private carrier.

PARTIES TO THE PROCEEDINGS

Petitioner in this case, defendant and appellant below, is Lisa Fisher. Respondent in this case, plaintiff and appellee below, is the United States of America. Lloyd Hasner was also a defendant and appellant below.

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Appendix G — Order Of The United States Court Of Appeals For The Eleventh Circuit Denying Petition For Rehearing Filed January 27, 2004 . . 44a

Petitioner Lisa Fisher respectfully requests the issuance of a writ of certiorari to review a decision of the United States Court of Appeals for the Eleventh Circuit regarding the application of 18 U.S.C. §§ 1341 and 1346.

OPINIONS BELOW

The opinion of the Eleventh Circuit is reported at 340 F.3d 1261 and is reproduced at Appendix A. The denial of the petition for rehearing and rehearing *en banc* is unreported and is reproduced at Appendix G.

STATEMENT OF JURISDICTION

The Eleventh Circuit entered its judgment on August 8, 2003 (App. A) and denied Fisher's petition for rehearing and rehearing *en banc* on January 27, 2004 (App. G). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Article 1, section 8 of the United States Constitution provides in pertinent part:

> Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states and with the Indian tribes.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The Tenth Amendment to the United States Constitution provides in pertinent part:

> The powers not delegated to the United State by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

18 U.S.C. § 1341 provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses. . . deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier . . . shall be fined under this title or imprisoned . . . or both.

18 U.S.C. § 1346 provides:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT OF THE CASE

The "honest services" mail fraud charges against Petitioner present overlapping violations of the Due Process Clause of the Fifth Amendment, the Tenth Amendment and the Commerce Clause, which, taken together, provide an egregious and troubling example of the unconstitutional encroachment of federal criminal law into the province of purely local activity.

Petitioner first brings a constitutional challenge to the use of 18 U.S.C. § 1346, the "honest services" fraud statute, to indict Petitioner, a private citizen, based solely on her alleged assistance, in connection with a local land transaction, in the

violation of Florida civil conflict of interest statutes governing the conduct of local public officials. The indictment against Petitioner clearly indicates that her alleged violation of 18 U.S.C. § 1346 was based solely on a federal grand jury's belief that she assisted in the violation of Florida conflict of interest statutes for which the Florida Legislature has affirmatively declined to impose criminal penalties, and which have never been interpreted to cover the conduct cited by the federal grand jury.

The Eleventh Circuit upheld Petitioner's "honest services" conviction even though the Department of Justice ("DOJ") did not, and could not, establish a violation of the Florida statutes which formed the sole basis of the "honest services" charges in the Indictment. In so doing, the Eleventh Circuit ignored the requirements of due process, as informed by principles of federalism, in direct conflict with decisions of the First, Second and Fifth Circuits, among others.

Compounding the lack of fair warning inherent in using 18 U.S.C. § 1346 to criminalize obscure state civil statutes, the grand jury premised Counts One (conspiracy) and Two (mail fraud) of the "honest services" charges on a single intrastate delivery by a private carrier of a payment connected to a local land transaction, which itself had no alleged or demonstrable connection to interstate commerce. Extension of federal jurisdiction over these purely intrastate activities likewise violates the constitutional limitations on Congress' power under the Commerce Clause and the Tenth Amendment.

A. Course of Proceedings Below

On November 8, 2001, Petitioner was convicted of conspiracy to commit mail fraud (Count One), mail fraud (Counts Two through Six), and making a false statement (Count Eight). Her convictions in Counts One through Six were

based on two separate grounds: (1) deprivation of money or property under § 1341; and (2) deprivation of "honest services" under §§ 1341 and 1346. The district court entered a judgment of acquittal on the first ground, leaving deprivation of "honest services" as the sole basis for Petitioner's convictions in Counts One through Six.

On February 22, 2002, Petitioner was sentenced to six months imprisonment. On August 8, 2003, the Eleventh Circuit affirmed Petitioner's convictions, but vacated her sentence in light of an unjustified upward departure by the district court. On January 27, 2004, the Eleventh Circuit denied Petitioner's petition for rehearing and rehearing *en banc*. On February 27, 2004, Petitioner, after completion of her incarceration, was resentenced to time served.

B. Statement of Facts

Petitioner, a private citizen, was convicted under Counts One through Six of the Indictment for defrauding the Palm Beach Housing Finance Authority ("HFA"), a local governmental body, of the "honest services" of her co-defendant, Lloyd Hasner. Hasner was the part-time, volunteer chairman of the HFA.

The "honest services" charges involved two unrelated local projects approved by the HFA. The Indictment charged that under three obscure Florida civil conflict of interest statutes, Hasner had an undisclosed conflict of interest that prohibited him from participating in these projects. The Indictment conceded, however, that Hasner voluntarily recused himself and did not vote upon the one project in which he had an undisclosed financial interest. Moreover, neither the Indictment nor the Bill of Particulars alleged that the HFA could have lost money or

suffered any other detriment as a result of Hasner's alleged violation of the three conflict of interest statutes.[1]

The federal grand jury indicted Petitioner for "honest services" fraud based solely and explicitly on her alleged role in assisting Hasner's violation of three Florida civil conflict of interest statutes:

> Florida Statute § 159.606 established ethical standards for Housing Finance Authority officials. This statute prohibited LLOYD HASNER from having any interest, direct or indirect, in any contract or proposed contract for materials or services to be furnished or used in connection with any "qualifying housing development" being financed by the Housing Finance Authority.

Indictment, ¶ 8.

> Florida Statute § 112.313(7)(a) established ethical standards of conduct for all public employees. This statute prohibited LLOYD HASNER from having any contractual relationship with any business entity that was doing business with the Housing Finance Authority. This statute also prohibited LLOYD HASNER from having a contractual relationship that would create a continuing conflict between his private interests and the full and faithful discharge of his public duties.

Indictment, ¶ 9.

> Florida Statute § 112.3143(4) prohibited any appointed public officer, including LLOYD

1. Indeed, the district court entered a judgment of acquittal on the "money and property" mail fraud charges. App. B.

> HASNER, from participating in any matter which would inure to the officer's special private gain or loss, or which the officer knew would inure to the special private gain or loss of a relative or business associate of the public officer, without first disclosing the nature of his or her interest in the matter.

Indictment, ¶ 10.

Although the grand jury cited specifically to these statutes in alleging its "honest services" charge against Petitioner, none of these statutes provide for criminal penalties or have ever been applied to similar facts by any Florida court or administrative agency. Additionally, all the facts set forth in the Indictment described activity that was purely local.

In fact, the sole basis set forth in the Indictment for the exercise of federal jurisdiction over the "honest services" charges in Count One (conspiracy) and Count Two (mail fraud) was a single intrastate FedEx delivery from Windermere, Florida to Delray Beach, Florida. DOJ stipulated at trial that it could not prove that the FedEx package at issue had traveled outside of Florida. Moreover, the "honest services" charges did not allege a single fact showing any nexus with interstate activity. Instead, the "honest services" charges concerned a local housing authority, a local land transaction and, as set forth above, local conflict of interest statutes.

At trial, DOJ argued for the first time that it did not have to prove a violation of any of the Florida statutes cited in the Indictment and explicitly relied upon by the federal grand jury in framing the "honest services" charges against Petitioner. Indeed, over objection, the district court excluded Petitioner's expert on the application of the Florida civil statutes. Moreover,

given the grand jury's clear reliance on the Florida civil statutes in formulating the "honest services" charges, Petitioner requested an instruction requiring the *petit jury* to find a violation of these state statutes. The district court responded that if defendants wanted such an instruction, he would instruct the jury that Hasner had violated at least one of the statutes. Hasner objected and the district court removed all reference to the Florida statutes from the Indictment and its instructions, despite the fact that the grand jury had cited and relied upon the civil statutes in bringing the Indictment.

On appeal, the Eleventh Circuit did not reach the critical issue of whether 18 U.S.C. § 1346 provided Petitioner with fair warning that she would be subject to federal criminal penalties solely on the basis of alleged but unproven violation of Florida *civil* statutes that had never been applied by any court or administrative agency to impose sanctions on the conduct at issue.

The Eleventh Circuit also rejected without analysis Petitioner's argument that the exercise of federal jurisdiction over Counts One and Two based solely on a single intrastate FedEx, where the acts at issue concerned a wholly intrastate land deal that had no demonstrable effect on interstate commerce, was unconstitutional under the Commerce Clause and the Tenth Amendment.

REASONS FOR GRANTING THE PETITION

1. The Application Of The "Honest Services" Fraud Statute To Create A Federal Crime Out of State Conflict of Interest Infractions Violates Due Process And Conflicts With The Decisions Of Other Circuits.

The definition of "honest services," as used in 18 U.S.C. § 1346 to broaden the federal mail and wire fraud statutes, is an incoherent patchwork that varies from Circuit to Circuit. Petitioner's conviction stands as a vivid example of the confused state of "honest services" law: the Eleventh Circuit's decision to affirm her conviction is in direct conflict with three different standards crafted by the Second, Fifth and First Circuits. Under each of those differing standards, Petitioner's "honest services" conviction would not stand.

For example, the Second Circuit in *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2004), *petition for cert. filed*, 72 USLW 3634 (March 29, 2004) (No. 03-1375) held that in self-dealing "honest services" cases, such as that of Petitioner, the government must prove, at a minimum, that the conflict of interest at issue was capable of causing detriment or loss to the victim. *Rybicki* also held that 18 U.S.C. § 1346 is not violated where the defendant had no duty of loyalty to the victim. There was no proof below that Petitioner's participation in an undisclosed conflict of interest was capable of causing detriment or loss to the victim. Nor did Petitioner owe the victim a duty of loyalty.

Taking a second approach, the Fifth Circuit in *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997), *cert. denied*, 522 U.S. 1028 (1997) held that, in order to sustain an "honest services" fraud charge, the government must always show that the defendant acted contrary to the requirements of state law. There was no such proof as to Petitioner below.

Adopting yet a third approach, the First Circuit, in *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996), reasoned that only where an Indictment premises "honest services" charges on allegations that the defendant violated a specific state law – as was the case in Petitioner's Indictment – would violation of state law have to be proven in order to sustain an "honest services" conviction. Again, there was no proof of a state law violation in Petitioner's case.

This petition, challenging the conviction of a private actor for "honest services" fraud based solely on the alleged, but unproven, violation of civil state statutes governing local conflicts of interest provides this Court with an opportunity to resolve the conflict among the Circuits regarding the scope of § 1346 and articulate clear limits to the federal criminalization of conduct traditionally and exclusively regulated by the State.

a. This Court And Several Circuits Have Long Recognized The Constitutional Implications of The Potentially Limitless Reach Of The "Honest Services" Fraud Statute.

Application of a criminal statute violates the Due Process Clause of the Fifth Amendment if the statute fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). *See also Bouie v. City of Colombia*, 378 U.S. 347, 350-1 (1964) ("A criminal statute must give fair warning of the conduct that it makes a crime."); *Connaly v. General Constr. Co.*, 269 U.S. 385, 393 (1926) ("[t]he citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions."); *Cleveland v. United States*, 531 U.S. 12, 24-25 (2000) (federal prosecutors

may only venture into the realm of state law when "Congress conveys its purpose clearly," otherwise, prosecutors will impermissibly "change the federal-state balance in the prosecution of crimes.")

This Court has long recognized the potential for unconstitutional vagueness in the application of the broad language of the federal fraud statutes. In 1987 this Court held that the mail fraud statute did not reach fraudulent schemes to cause the deprivation of the intangible right to honest services. *McNally v. United States*, 483 U.S. 350 (1987). The *McNally* Court equated the judge-made doctrine of an intangible right to honest services under § 1341 to "the intangible right of the citizenry to good government." *Id.* at 355-56. This Court also made clear that § 1341 must be interpreted narrowly to avoid ambiguity and keep the federal government from setting standards of disclosure and good government in state law matters. *Id.* at 360.

A year after the opinion in *McNally*, Congress enacted § 1346, which explicitly included within the definition of "scheme to defraud" in § 1341, and other federal fraud statutes, the deprivation of "the intangible right to honest services." 18 U.S.C. § 1346. Congress provided no definitional guidance, leaving the lower courts to continue to wrestle with determining the appropriate scope of "honest services." Both before and after this Court's opinion in *McNally*, the potentially limitless reach of the charge of "honest services" fraud has troubled most Circuits.

Commenting on the undefined nature of the "honest services" statute, the Seventh Circuit in *United States v. Bloom*, 149 F.3d 649, 654 (7th Cir. 1998) stated:

> [I]t is frightening to contemplate the prospect that the federal mail fraud statute makes it a crime

> punishable by five years' imprisonment to misunderstand how a state court in the future years will delineate the extent of impermissible conflicts. Then we would have a federal common-law crime, a beastie that many decisions say cannot exist.

See also United States v. Margiotta, 688 F.2d 108, 142-43 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (Winter, J., concurring in part and dissenting in part) (under the "honest services" standard "juries are left free to simply apply a legal standard which amounts to little more that the rhetoric of sixth grade civics classes. One searches in vain for even the vaguest contours of the legal obligation to conduct governmental affairs 'honestly' or 'impartially,' to ensure one's 'honest and faithful participation' in government and to obey 'accepted standards of moral uprightness, fundamental honesty, fair play and right dealing.'"); *United States v. Brown*, 79 F.3d 1550, 1556-57 (11th Cir. 1996) ("A limitless reading of the mail fraud statute could result in a kind of federal criminal common law, that is, a situation where a person could be convicted of a crime against the United States despite the conduct not violating an express statutory provision"); *United States v. Martin*, 195 F.3d 961, 965 (7th Cir. 1999), *cert. denied*, 530 U.S. 1263 (2000) ("Concern has long been expressed that the failure of the mail fraud statute to define 'fraud' invites prosecutorial overreaching"); *United States v. Rabbit*, 583 F.2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979) ("Every case of breach of public trust and misfeasance in office in connection with which some mailing has occurred does not and cannot fall within the confines of the mail fraud statute); *United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997) ("it would give us great pause if a right to honest services is violated by every breach of

contract or every misstatement made in the course of dealing."); *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984) ("with the broadening scope of the statute to cover intangible harms, however, has come a certain amount of confusion and controversy over the outer boundaries. . . .").[2]

b. The Opinion Below Directly Conflicts With The Second Circuit Opinion in *Rybicki* Defining The Scope Of Section 1346.

Recently, the Second Circuit *en banc* in *Rybicki*, while upholding the "honest services" statute against a challenge for vagueness, acknowledged that the scope and application of § 1346 is an issue of concern and disagreement between Circuits, stating there is "a valid argument that the Supreme Court . . . should in an appropriate case seek to resolve inconsistencies in circuit analysis of section 1346." *Rybicki*, 354 F.3d at 144.

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2. Commentators have also pointed out that the undefined language of § 1346 is ripe for abuse. *See e.g.* John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 17, 127 (1981) (doctrine of "honest services" is little more than "that of fair play, an obviously elusive standard upon which to make the question of criminal liability turn."); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone To Watch Over Us*, 31 Harv. J. Legis. 153, 195-96 (1994) ("[t]he term 'honest services' does not clearly state the content of criminal conduct. 'Honest services' is an evolving, aspirational term that describes a level of conduct that may never be attained. In addition, the term 'honest,' politics, only a blurred and shifting line separates political corruption from political patronage, and honest from dishonest service.")

Although rejecting the constitutional challenge to the statute, the *Rybicki* majority conceded that the language of the statute was not helpful in discerning "a clear and properly limited meaning of 'scheme or artifice to deprive another of the intangible right of honest services.'" *Id.* at 135. Rather, the court analyzed varying pre- and post-*McNally* "honest services" cases and cobbled together "elements" of an "honest services" charge that would provide the necessary limitations that the plain language of the statute did not. The four dissenters in *Rybicki* strongly criticized the majority's methodology, arguing that a court could not salvage the statute by reading judicially crafted limitations into it:

> [T]he vagueness of the statute has induced court after court to undertake a rescue operation by fashioning something that (if enacted) would withstand a vagueness challenge. The felt need to do that attests to the constitutional weakness of section 1346 as written. And the result of all these efforts – which has been to create different prohibitions and offenses in different circuits – confirms that the weakness is fatal. Judicial invention cannot save a statute from unconstitutional vagueness; courts should not try to fill out a statute that makes it an offense to "intentionally cause harm to another," or to "stray from the straight and narrow," or to fail to render "honest services."

Id. at 163-64 (Jolly, J., dissenting). The majority, they concluded, was engaging in the same rescue operation. *Id.*

In articulating its standard, the majority identified two types of "honest services" violations: bribery and self-dealing. In cases involving self-dealing, such as the one here, the court noted that the government may have to prove the conflict of

interest was, at minimum, capable of causing some detriment. *Id.* at 138, 141. Thus, the court held that "in self-dealing cases, the existence of a conflict of interest alone is not sufficient . . ." to support a charge under § 1346. *Id.* at 141.[3]

Although finding § 1346 was not unconstitutionally vague, the *Rybicki* majority reaffirmed the acquittal by an earlier panel of the Second Circuit in an "honest services" prosecution with facts strikingly similar to the facts below, *United States v. Handakas*, 286 F.3d 92 (2d Cir.), *cert. denied*, 537 U.S. 894 (2002) (overruled in part by *United States v. Rybicki*). In *Handakas*, the panel overturned an 'honest services" conviction, holding that § 1346 was void for vagueness as applied. Handakas was a contractor who willfully breached a contract he had with a New York City authority, and in doing so violated a state law wage reporting statute. The *Handakas* court noted that even lawyers familiar with mail fraud would lack notice that federal law criminalizes obscure state law violations:

> If we were to affirm Handakas' mail fraud conviction on the grounds that he violated a state mandated undertaking . . . we would effect a breathtaking expansion of mail fraud. Every breach of contract or *state law* (committed in the vicinity of a telephone) and every false *state* tax return (sent by mail) would become punishable as a *felony* in federal court.

Handakas, 286 F.3d at 107. Significantly, the *Handakas* court found:

> No case in which a mail fraud conviction based on the "honest services" provision was premised on a

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3. In contrast, the court found that in bribery cases, "the undisclosed bribery itself is sufficient to make out a crime." *Rybicki*, 354 F.3d at 141.

> scheme to deprive another of the "honest" performance of purely contractual duties *or statutorily imposed duties* to submit information to a state agency.

Id. at 111. (emphasis added). The *en banc Rybicki* court overruled the *Handakas* court's holding of unconstitutionality, finding instead that § 1346 did not apply to Handakas in the first instance because he did not have a duty of loyalty the breach of which would give rise to a violation of 18 U.S.C. § 1346. *Rybicki*, 354 F.3d at 144.

Under the "elements" articulated by the *Rybicki* majority, Petitioner's conviction for "honest services" fraud would not stand. As in *Handakas*, Petitioner was a private sector actor who did not have a duty of loyalty to the HFA other than that imposed by contract, which she undisputedly fulfilled. Likewise, under *Handakas*, Hasner's statutorily imposed duty to submit conflict information to the HFA could not form the basis of a criminal "honest services" charge.

Moreover, even though the charges against Petitioner were based on Hasner's alleged conflict of interest, no evidence was presented that the alleged self-dealing was capable of, much less did, cause any detriment to the HFA, the only alleged victim. The elements for an "honest services" fraud charge, in the context of self-dealing, set forth by the *Rybicki* court were not met below. Thus, in upholding Petitioner's conviction, the Eleventh Circuit is in direct conflict with the Second Circuit in *Rybicki,* as well as *Handakas* as modified by *Rybicki*.

c. The Opinion Below Directly Conflicts With the Fifth Circuit Opinion in *Brumley* and the First Circuit Opinion in *Sawyer* Defining The Scope Of Section 1346.

The Indictment in this case explicitly premised the "honest services" charges against Petitioner on Hasner's violation of three state civil ethics statutes. The Fifth Circuit in *Brumley* held that the government must prove a violation of state law whenever it brings an "honest services" charge involving a state or local official:

> Under the most natural reading of the ["honest services"] statute, a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law. Stated directly, the official must act or fail to act contrary to the requirements of his job under state law. This means that if the official does all that is required under state law, alleging that the services were not otherwise done "honestly" does not charge a violation of the mail fraud statute. The statute contemplates that there must first be a breach of a state-owed duty. It follows that a violation of state law that prohibits only appearances of corruption will not alone support a violation.

116 F.3d at 734. Explaining further, the Fifth Circuit noted that "if the employee renders all the services his position calls for, and if these and all other services rendered by him are just the services which would have been rendered by a totally faithful

employee, and if the scheme does not contemplate otherwise, there has been no deprivation of honest services." *Id.*[4]

In contrast, the First Circuit, in *Sawyer*, held that only where the "honest services" charge in an indictment is explicitly based on the violation of a state statute, as was the Indictment below, must the government prove a state statute was violated in order to sustain an "honest services" charge. *Sawyer*, 85 F.3d at 726. *See also United States v. D'Alessio*, 822 F. Supp. 1134 (D.N.J. 1993) (because of ambiguity as to whether state law which formed the basis of the § 1346 charge actually prohibited the conduct at issue, § 1346 charge could not stand); *United States v. Ferber*, 966 F. Supp. 90, 106 (D. Mass. 1997) (gratuity statute not a valid Travel Act predicate where criminal enforcement of the gratuity statute had never extended to anyone in defendant's situation).

Contrary to the limitations on "honest services" articulated in *Brumley* and *Sawyer*, Petitioner here was convicted even though the government conceded that it could not show any violation of the civil state statutes on which the charges in the Indictment were explicitly based. Indeed, the Eleventh Circuit summarily affirmed the district court's determination that the state statutes underlying the charging portion of the Indictment were surplusage, accepting the government's argument that the "honest services" charges were based on a breach of a common

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4. The *Brumley* court did not reach the issue, presented here, of whether violation of the "honest services" mail fraud statute could ever be based on the alleged violation of state *civil* law. *Brumley*, 116 F.3d at 734. As discussed above, such an application of the "honest services" statute violates due process as the violation of a state civil statute would not under any circumstances be commonly understood to possibly result in federal criminal prosecution.

law fiduciary duty, even though the words "common law" and "fiduciary duty" appear nowhere in the Indictment. *Hasner*, 340 F.3d at 1269.

The Eleventh Circuit's willingness to uphold Petitioner's conviction on the basis of an alleged breach of a common law fiduciary duty not articulated anywhere in an Indictment stands in sharp contrast to the requirements articulated in *Brumley*. As the *Brumley* court explained "the rights of citizens to honest government have no purchase independent of rights and duties locatable under state law. To hold otherwise would offer § 1346 as an enforcer of federal preferences of 'good government' with attendant potential for large federal inroads into state matters and genuine difficulties of vagueness." 116 F.3d at 735.

Likewise, the opinion below is in direct conflict with the First Circuit's opinion in *Sawyer*. The charges against Petitioner below were explicitly premised, in the Indictment, on Hasner's violation of the three Florida ethics statutes. Under *Sawyer*, having chosen to premise its "honest services" charges specifically on alleged violations of state law, DOJ would have been required to prove a violation of these statutes in order to succeed on its "honest services" charges against Petitioner. As noted above, the DOJ conceded at trial it could not prove any such violation. Thus, under *Sawyer*, the Petitioner's conviction could not be upheld.

d. The Eleventh Circuit's Analysis Of The Constitutional Issue Below Was Severely Flawed.

Ignoring the significant Due Process issues raised by the limitless application of the "honest services" fraud statute – and the inconsistent standards articulated by the *Rybicki*, *Sawyer* and *Brumley* courts in an attempt to define the reach of "honest services" fraud – the Eleventh Circuit below sidestepped the

question of whether the application of § 1346 to Petitioner's conduct was unconstitutional. Rather, the court, without considering the facts before it, summarily determined that the specific intent requirement of the mail fraud statute effectively *per se* defeated any possible vagueness claim concerning the notice prong of the test in *Kolender*. *Hasner*, 340 F.3d at 1268-69. This reliance on the intent requirement to shield the "honest services" fraud statute from all "as applied" vagueness challenges has been criticized by commentators:

> [I]t is difficult to understand how specific intent nullifies the notice prong of the vagueness test in the context of mail fraud. Defendants in political corruption cases may or may not intend to reap a personal financial benefit, but may not intend to defraud the state or its citizenry of money or property, and in fact do not. It is also unlikely that political corruption defendants specifically intend to deprive the citizenry of their right to good government. . . Finally, even if the defendants intended to divert funds, they arguably did not intend to violate the statute. It is, after all, possible to cause a result intentionally and yet be without fair warning that such conduct is criminal.

Moohr, 31 Harv. J. Legis. at 195.

Moreover, in rejecting Petitioner's argument, the Eleventh Circuit did not address the second prong of the constitutional test for vagueness that this Court articulated in *Kolender*: namely, whether § 1346 "defines the criminal offense . . . in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender*, 461 U.S. at 357 ("Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we recognized recently that the more important

aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.") (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

The Eighth Circuit addressed the very real dangers of overzealous prosecution for "honest services" fraud in *United States v. McNeive*, 536 F.2d 1245, 1251 (8th Cir. 1976). The defendant in *McNeive* had been convicted of "honest services" fraud for receiving approximately $400 in unsolicited tips while performing his non-discretionary duties as the city's Chief Plumbing Inspector. In reversing the conviction, the Eighth Circuit explained:

> While we sympathize with the zealous prosecutor's view in this case . . . , this does not transform the practice [at issue] into a mail fraud violation, nor does it give the prosecutors license to inject themselves into local affairs to attempt to rectify the problem. To permit the Government to do so in this case would effect a further extension of § 1341 so as to cover all actions which might offend the Government's sense of personal propriety.

Id. at 1252. *See also* Moohr, 31 Harv. J. Legis. at 177 ("Prosecutors do not apply the standards of an articulated federal policy to the behavior of state and local officials. Because of the manner in which the intangible rights doctrine evolved, no such policy exists. Instead, prosecutors impose their personal and subjective standards of good government on those subject to their jurisdiction. Understandably, there is disagreement over the nature of those standards of public morality, and the

prosecutor's standards may or may not be those of the electorate. The result is inadequate notice of criminality.").

e. The Conflict Between The Circuits As To The Breadth Of The "Honest Services" Fraud Statute Warrants Grant Of Certiorari In This Case.

As both the majority and dissent in *Rybicki* recognized, in light of the conflicting interpretations of "honest services" fraud in the different Circuits, "there [i]s a valid argument that the Supreme Court . . . should in an appropriate case seek to resolve inconsistencies in circuit analysis of section 1346." *Rybicki*, 354 F.3d at 144. This is that case.

In upholding Petitioner's conviction, the Eleventh Circuit has expanded the reach of § 1346 to criminalize under federal law conduct which was addressed by Florida *civil* statutes and concerned wholly local activity. The Florida statutes at issue here have never been interpreted by any court to apply to the conduct at issue and the Florida Legislature deliberately decided ***not*** to impose criminal liability for the violation of these statutes. Nothing in the Florida statutes relied on in the Indictment, or in 18 U.S.C. §§ 1341 and 1346, would indicate to Petitioner that alleged violations of those *state civil* statutes could subject her to *federal criminal* sanctions. Indeed, under the standards set forth by the Second, Fifth and First Circuits, Petitioner's conviction would not stand.

Throughout the divergent views both within and between the Circuits that have interpreted § 1346, one theme is constant: concern for the increasingly overbroad application of the "honest services" statute to reach actions which a defendant could not have foreseen would have federal criminal consequences. In the vacuum created by *McNally* and the subsequent enactment

of § 1346, the different Circuits have crafted varying, and often inconsistent, limitations on prosecution under § 1346, as illustrated by the four different standards articulated by the First, Second, Fifth and Eleventh Circuits. This split between the Circuits creates the danger of a fundamental unfairness in prosecutions under the "honest services" fraud statute that is vividly illustrated by Petitioner's situation. Resolving these conflicts and settling the important issue of the boundaries of the § 1346 is a compelling reason for this Court to grant certiorari to review Petitioner's conviction under § 1346.

2. The Exercise of Federal Subject Matter Jurisdiction Over Counts One and Two of the Indictment Based Upon A Single Intrastate Delivery By A Private Carrier, Where The Indictment Alleges Activity That Is Wholly Local, Violates the Commerce Clause and the Tenth Amendment.

The unconstitutional application of the "honest services" statute to Petitioner's wholly local conduct is compounded by the fact that the sole jurisdictional basis for the "honest services" charges in Counts One and Two of the Indictment consists of a single delivery of an intrastate FedEx package between Windermere, Florida and Delray Beach, Florida. The exercise of jurisdiction below creates a clear fundamental conflict with the federalism principles recently articulated by this Court in *United States v. Lopez*, 514 U.S. 549, 551 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000).

At the outset, in upholding federal jurisdiction based on this single intrastate delivery, the Eleventh Circuit relied, without analysis, on the opinion of the Fourth Circuit in *United States v. Photogrammetric Data Serv., Inc.*, 259 F.3d 229 (4th Cir. 2001), *cert. denied*, 535 U.S. 926 (2002) and the Second Circuit in *United States v. Gil*, 297 F.3d 93 (2d Cir. 2002), which in turn

also relied on *Photogrammetric*. 297 F.3d at 100. But this Court's recent Commerce Clause jurisprudence clearly shows that the *Photogrammetric* court was wrong in finding that the Commerce Clause reaches wholly intrastate deliveries by private and commercial carriers under the mail fraud statute.

More importantly, in contrast to both *Photogrammetric* and *Gil*, the entire factual basis for the mail fraud charges against Petitioner in Counts One and Two of the Indictment concerned the duties of a local, volunteer official and his compliance with Florida ethics statutes in connection with a local land deal. The exercise of federal jurisdiction based upon an *intrastate* mailing under these circumstances flies in the face of this Court's numerous pronouncements concerning the importance of maintaining the balance between state and federal powers, particularly in the area of criminal law.

It is axiomatic that the power of the federal government is limited to those powers enumerated in the Constitution. As explained by this Court:

> We start with the first principles. The Constitution creates a Federal Government of enumerated powers. *See* Art. I, § 8. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, ¶ 292-293 (Rossiter ed. 1961).

Lopez, 514 U.S. at 551. This limitation on federal power arises both from the Constitution and the Tenth Amendment, which provides that any powers not delegated to the federal government by the Constitution, and not prohibited to the States, "are reserved to the States respectively, or to the people."

U.S. CONST., amend. X. Indeed, this Court has noted that the enumerated powers in the Constitution and the limitations of the Tenth Amendment are mirror images of each other. *See New York v. United States*, 505 U.S. 144, 156 (1992).

Although the Constitution grants Congress the power to regulate interstate commerce, this power is limited by "the very language of the Commerce Clause." *Lopez*, 514 U.S. at 552. The Commerce Clause does not reach "commerce, which is completely internal" and "does not extend to or affect other States." *Id.* at 553. As this Court observed, "such a power would be inconvenient, and is certainly unnecessary." *Id.*

The activity forming the bases for Counts One and Two of the Indictment fall precisely within this description of purely local activity that the Commerce Clause powers do not reach – the actions described in the Indictment were completely internal to Florida and did not extend or affect other States in any way.

Recently, in *Morrison*, this Court again reiterated the boundaries of the Commerce Clause by striking down the civil remedy provision of the Violence Against Women Act. In so doing, this Court explained the critical importance in maintaining a balance between state and federal powers:

> The scope of interstate commerce power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would eventually obliterate the distinction between what is national and what is local and create a completely centralized government.

529 U.S. at 1748-9 (quotation omitted). Of particular significance to this case, this Court emphasized the uniquely

local character of the power to regulate criminal activity. *Id.* at 1754. ("The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels or goods involved in interstate commerce has always been a province of the States."). *See also Lopez*, 514 U.S. at 561 n.3 ("States possess primary authority for defining and enforcing the criminal law."); *United States v. Carmichael*, 232 F.3d 510, 516 (6th Cir. 2000), *cert. denied*, 532 U.S. 974 (2001) ("The United States does not have the power under the Commerce Clause to outlaw purely intrastate crime."); *O'Rourke v. City of Norman*, 875 F.2d 1465, 1469 (10th Cir. 1989), *cert. denied*, 493 U.S. 918 (1989) ("In the Constitution, the power to regulate criminal law has been left to the individual States and this power cannot be abridged by Congress.").

Against this background of established federalism principles, the Eleventh Circuit below improperly upheld jurisdiction under the Commerce Clause for mail fraud and a mail fraud conspiracy arising from facts that exclusively concern issues of local government, state ethics rules and local land deals on the basis of a single concededly intrastate delivery by a private carrier.

In *Lopez*, this Court explained that Congress' power under the Commerce Clause is limited to its ability to (1) regulate the "use of channels of interstate commerce;" (2) "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even when the threat may only come from intrastate activity;" and (3) "regulate activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59 (internal citations and quotations omitted).

In relying, without analysis, on the holdings in *Photogrammetric* and *Gil* that the exercise of jurisdiction over private and commercial carriers in the mail fraud statute falls

under *Lopez* category two, the Eleventh Circuit applied those courts' incorrect analysis to facts even further removed from any connection to interstate commerce and stretched the reach of the Commerce Clause beyond its Constitutional limits.

In *Photogrammetric*, which involved charges of federal highway project fraud, the court incorrectly affirmed the district court's finding that the mail fraud statute, as applied to the use of a private and commercial interstate carrier, fell within *Lopez* category two and, therefore, jurisdiction over intrastate deliveries was authorized under the Commerce Clause. 259 F.3d at 250-252. In reaching this conclusion, the Fourth Circuit wrongly focused its analysis solely on the fact that the private or commercial carrier at issue (UPS) was an "instrumentality of interstate commerce." *Id.* at 251. This approach expands *Lopez* category two to encompass every conceivable exercise of the Commerce Clause powers. If the sole test is whether the regulated activity concerns, in some infinitesimal way, an instrumentality of interstate Commerce, then *Lopez* category one (regulation of the use of channels of interstate commerce) is rendered superfluous. *See id.* at 260. (Williams, J. concurring in part, concurring in judgment) (the majority's interpretation "conflates *Lopez's* second category with its first.").

The cases relied on by the *Photogrammetric* court in reaching its conclusion are likewise distinguishable from the facts alleged here. None of those cases concerned either the mail fraud statute, or a statute with identical language. Moreover, in each of those cases, the court was either construing a statute which specifically concerned a "facility in interstate commerce" or specifically required proof that the criminal conduct affected

interstate commerce, or where the government had presented evidence of interstate activity.[5] *Id.* at 251.

As strongly pointed out by Judge Williams in his concurrence in part, the *Photogrammetric* majority's interpretation, here applied by the Eleventh Circuit to charges which bear *no* connection to interstate commerce, "allows Congress unbounded authority to legislate federal criminal laws that only incidentally involve instrumentalities of interstate commerce," leading to untenable results. *Id.* at 260. Judge Williams also correctly noted that a *Lopez* category two statute is one that "directly or indirectly regulate[s] the instrumentality to protect it from harm resulting from improper use." *Id.* In contrast, the mail fraud statute "simply prohibits illegal or immoral use of the instrumentality." *Id.*

Indeed, an examination of the cases cited in *Lopez*, 514 U.S. at 558, illustrates the type of statutes whose enactment fall under category two, and makes clear that those statutes, in contrast to the mail fraud statute at issue here, directly regulate or protect the actual instrumentalities of interstate commerce. *See Shreveport Rate Case*, 234 U.S. 342 (1914) (holding Congress may delegate to the Interstate Commerce Commission authority to regulate the intrastate rates maintained by carriers in order to remove unjust discrimination against interstate commerce as a result of the rate differential based solely on whether the commerce crossed state lines, which rate differential had an adverse effect on commerce across state lines); *Southern R.R. Co. v. United States*, 222 U.S. 20 (1911) (holding that safety

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5. The Second Circuit, in *Gil*, which concerned the alleged submission of inflated invoices for construction services, relied heavily on *Photogrammetric* and many of the same inapposite cases to erroneously conclude that the private and commercial carrier portion of mail fraud statute falls under *Lopez* category two.

appliance act, which required that all locomotives, cars and similar vehicles used on any railway engaged in interstate commerce be equipped with certain designated safety devices, was authorized under Commerce Clause, regardless of whether the vehicles are used in moving intrastate traffic; regulation of intrastate vehicles was directly related to the goal of ensuring the safety of interstate commerce and of those employed in its movement); *Perez v. United States*, 402 U.S. 146 (1971) (citing as examples of category two Commerce Clause statutes: 18 U.S.C. § 32, prohibiting destruction of aircraft, and 18 U.S.C. § 659, prohibiting theft from interstate shipments).

Congress clearly acted in each of the above-discussed *Lopez* category two statutes to directly regulate the instrumentality of interstate commerce or directly protect that instrumentality from harm that would affect its interstate activities. In sharp contrast, the portion of the mail fraud statute relating to private and commercial carriers does not directly regulate the private and commercial carrier, but rather the use of the carrier in illegal activity. Thus, the private and commercial carrier portion of the mail fraud statute falls either into *Lopez* category one or three.

This difference in categorization is not a mere technicality. Had the Eleventh Circuit applied the test under either *Lopez* category one or three, DOJ would not have met its burden to establish federal jurisdiction as there was no connection between the delivery at issue and interstate commerce. DOJ stipulated that it could not prove the FedEx to Hasner had left the state, thus there was no evidence of a "use" of a channel of interstate commerce. Moreover, DOJ failed to show that the activities at issue (which were, in fact, wholly local) substantially affected interstate commerce, as is required under *Lopez* category three, as it could not aggregate all the contacts with FedEx to establish an interstate nexus. *See United States v. Odom*, 252 F.3d 1289 (11th Cir. 2001), *cert. denied*, 535 U.S. 1058 (2002).

This misanalysis of the *Lopez* categories, begun by the Fourth Circuit in *Photogrammetric* and then by the Second Circuit in *Gil* and the Eleventh Circuit here – in a case with no interstate nexus – results in an exercise of Commerce Clause jurisdiction completely at odds with the critical federalism issues this Court addressed in striking down the statute in *Lopez*. As illustrated by this case, this misinterpretation allows the federal government, under the Commerce Clause, an unfettered ability to reach, and criminalize, wholly local activities that have *no* connection to interstate commerce. Such an interpretation effectively nullifies this Court's mandate in *Lopez* and *Morrison* that principles of federalism require that the reach of the Commerce Clause be given meaningful limits, particularly in the area of general criminal law.

These cases articulate a method of analysis which threatens to expand the reach of the Commerce Clause well beyond its constitutional boundaries and Petitioner respectfully suggests that this case, which, unlike *Photogrammetric* and *Gil*, involved *no* interstate activity, provides an appropriate opportunity to correct the lower courts' analysis of the reach of the private and commercial carrier portion of the mail fraud statute under the Commerce Clause.

Nor should the fact that there is no Circuit conflict counsel against granting certiorari here. The interpretation of federal criminal statutes has often been thought to warrant consideration by this Court, even in the absence of a conflict between the Circuits. Indeed, in *United States v. McNally*, 483 U.S. 350 (1987), the leading case on "honest services" mail fraud, this Court granted certiorari to review (and ultimately reversed) the application of the intangible rights doctrine under the mail fraud statute, notwithstanding the unanimous interpretation by the lower courts that such an application was appropriate.

Here, the issues of federalism implicated by the lower courts' improper application of the principles set forth in *Lopez* create a compelling case for certiorari.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AUGUST 8, 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10989

D.C. Docket No. 01-08069 CR-WPD

UNITED STATES OF AMERICA,

Plaintiff-Appellee, Cross-Appellant,

versus

LlOYD HASNER, LISA FISHER,

Defendants-Appellants, Cross-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(August 8, 2003)

Before EDMONDSON, Chief Judge, DUBINA, Circuit Judge, and HODGES,* District Judge.

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* Honorable Wm. Terrell Hodges, United States District Judge for the Middle District of Florida, sitting by designation.

Appendix A

PER CURIAM:

Lloyd Hasner and Lisa Fisher Meuche ("Fisher") were convicted, following a jury trial, for (1) conspiracy to commit mail fraud, in violation of 18 U.S.C. § 371, and (2) mail fraud, in violation of 18 U.S.C. § 1341. Hasner was also convicted of money laundering, in violation of 18 U.S.C. § 1957, and Fisher was convicted for making false statements, in violation of 18 U.S.C. § 1001. Hasner and Fisher appeal, challenging their convictions. Fisher also appeals her sentence. The government cross appeals the district court's imposition of sentence for Hasner and Fisher.

I. BACKGROUND

The Palm Beach County Housing Finance Authority ("HFA") is a governmental entity chartered under Florida law to fund low-cost housing. Hasner was the chairman of the HFA, the proprietor of Hasner Realty, and an officer in Castle Florida Building Corporation: a construction company owned by his brothers. Lisa Fisher was a sales associate with Main Street Realty and owned Lisa Fisher & Company: a real estate consulting firm.

At the September 1996 HFA meeting, Hasner proposed that Fisher be hired as a consultant. The HFA approved the motion to negotiate a contract with Fisher. Richard Ellington, a lawyer who served as the paid legal adviser to the HFA, was directed to prepare a contract. This agreement was presented to the HFA at its October 1996 meeting. The agreement provided for a six-month contract with Fisher at $ 5,000 per month and reimbursement of Fisher's expenses.

Appendix A

Due to concerns about the amount of expenses to be paid, final action on the contract was deferred.

In the interim, Fisher was retained by Hawthorne Ltd., a developer of low-income housing projects, to find potential sites in Florida. Fisher contacted Hasner about the availability of potential project sites. On 13 November 1996, Hasner contacted Chris Fleming at Reichel Realty & Investments, Inc. ("Reichel Realty") about a 30-acre tract of land in Greenacres City, Florida. This 30-acre parcel of land would later be named Chelsea Commons. Hasner registered Fisher as the agent for a potential buyer.[1] At Hasner's direction, Fisher contacted Fleming to confirm that she was acting on behalf of Hawthorne.

On 14 November 1996, Fleming and Fisher reached an oral understanding for the sale of the 30-acre tract to Hawthorne for $1.8 million. That same day, Fleming sent Fisher a letter confirming their agreement on the distribution of the 6% brokers's commission. Under this agreement, Reichel Realty and Main Street Realty, respectively, were to receive 3-1/2% and 2-1/2% of the commission. It was also agreed that Reichel Realty and Fisher would each pay Hasner a referral fee of $4,500. In addition, Main Street Realty agreed to pay Hasner a referral fee of 1% of the purchase price, or $18,000.

At the 18 November 1996 HFA meeting, it was announced that Hawthorne had secured a potential

1. A broker representing a buyer registers his client with the listing agent to preserve his interest in the commission.

development site and wished to enter a proposal for the development of a publicly-funded affordable housing development. It was revealed that Fisher had been retained by Hawthorne and would receive a $30,000 contingency fee from Hawthorne upon HFA's final approval of the project.

At the 18 November meeting, the HFA also discussed the issue of Fisher's still-pending consulting contract. An HFA member expressed concern over Fisher's simultaneous employment by Hawthorne and HFA. As a result, a provision was added to Fisher's contract with the HFA which required Fisher to disclose any clients appearing before or submitting materials to the HFA. The HFA — including Hasner — unanimously approved Fisher's consulting contract with the HFA. Neither Fisher nor Hasner disclosed that, if the Chelsea Commons sale was completed, Hasner would receive a referral fee. Thereafter, beginning in January 1997 and continuing through June 1997, Fisher received by mail her monthly retainer and expense reimbursements from the HFA.

On 16 December 1996, Hawthorne presented its proposal for Chelsea Commons and sought to have the project financed by HFA's issuance of about $16 million in tax-exempt bonds. At this meeting, Hasner announced that he had a "potential conflict" and recused himself from voting on the matter. Hasner also executed the prescribed form, stating that he had a potential conflict and was abstaining from discussing or voting on the matter. Hasner did not disclose the nature of his conflict to the HFA. The HFA voted to proceed with the development.

Appendix A

In early 1997, Castle Florida, the construction company owned by Hasner's brothers, negotiated a contract with Hawthorne to consult on the Chelsea Commons project. Ellington made an inquiry to the Florida Attorney General and the Florida Ethics Commission about the obligations of an HFA member who obtains a contract for services to be furnished in conjunction with a qualifying housing development. After Ellington was informed that the possession of such an interest violated Fla. Stat. § 159.606, Hasner submitted a letter stating that he had resigned as an officer of Castle Florida on 10 February 1997 and that Castle Florida's contract with Hawthorne had terminated.

At the 2 June 1997 HFA meeting, before the final vote on the Chelsea Commons project, an HFA member asked to be advised on conflicts involved in the project. Ellington informed the HFA, in the presence of Hasner and Fisher, that Hasner at one point thought that he might be the contractor for Chelsea Commons, but that this event was not going to happen. Ellington stated, however, that Hasner would continue to desist from voting on the Chelsea Commons issue. Ellington also noted that Fisher had disclosed from the beginning that she was the agent for the project. Ellington then stated "[o]ther than that, I don't know of any other disclosures that need to be made." Neither Ellington, Hasner, or Fisher informed the HFA that Hasner was to receive a $27,000 brokerage fee from the Chelsea Commons project.

The Chelsea Commons project involved the separate closings of the real estate and bond transactions. The real estate sale closed first. The initial draft of the closing statement ("HUD-1"), prepared by the buyer's attorney, Gary

Johnson, omitted all reference to Hasner's fees. Later, upon receiving the 14 November agreement reflecting Hasner's $9,000 fee from Reichel and Main Street Realty, Johnson revised the HUD-1 to reflect the $9,000 payment to Hasner. The HUD-1 did not reflect the additional $18,000 fee Hasner was to receive from Main Street Realty.

Upon receiving the revised HUD-1, HFA's bond counsel, Steve Sanford, and the developer's attorney, Randy Alligood, concluded that Hasner's receipt of payment was improper. As a condition of the bond issuance, the attorneys were required to warrant that the matter being financed had been conducted in accordance with Florida law, including the conflict of interest provisions of Fla. Stat. § 159.606.[2] Alligood and Sanford informed Ellington that they would withhold their approving opinions if Hasner's payment was not repudiated.

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2. Florida Statute section 159.606 provides in relevant part:

> "No member or employee of a housing finance authority shall acquire any interest, direct or indirect, in any qualifying housing development or in any property included or planned to be included in such a development, nor shall a member or employee have any interest, direct or indirect, in any contract or proposed contract for materials or services to be furnished or used in connection with any qualifying housing development. If any member or employee of a housing finance authority owns or controls an interest, direct or indirect, in any property included or planned to be included in any qualifying housing project, the member or employee shall immediately disclose the same in writing to the housing finance authority."

Appendix A

Alligood prepared a letter for Hasner's signature, in which the real estate fee was disclaimed and its inclusion in the closing statement deemed a mistake. Ellington spoke with Hasner and informed him that "to fix the situation" Hasner should sign the letter disclaiming the interest in the $9,000 real estate fee and that Fisher would pay the fee to Hasner out of an unrelated project called Tierra Vista. Ellington stated that it had to "be very understood" among Ellington, Hasner, and Fisher that "nobody else is to know about it."

Hasner then contacted Fisher to obtain her assurance that he would be paid his commission even if he renounced his fees. Fisher attempted to assure Hasner that the owner of Main Street Realty, Judy Black, would not learn of the disavowal letter. Hasner later informed Ellington that he would allow the entire housing project to "crater" if he did not receive a written commitment from Main Street Realty that he would receive his full fee. Fisher called Steve Chitwood, the senior broker involved in Main Street Realty's commercial real estate sales. According to Fisher, Chitwood, after some debate, gave his permission for Hasner to be paid from the Tierra Vista project. Nothing in the closing documents possessed by Main Street Realty reflected that Hasner was to receive a commission from the Tierra Vista project. According to Black, it would have been Chitwood's responsibility to note the changes in the file. Black agreed, however, that the change was absent from the file did not necessarily mean that Chitwood had not agreed to it.

Fisher provided Hasner with a handwritten letter signed by Fisher as an associate of Main Street Realty: a letter stating that Hasner Realty had earned a real estate commission from

the Tierra Vista project. Hasner then signed the Chelsea Commons disavowal letter. After receiving Hasner's disavowal letter, the attorneys issued their opinion letters for the bonds. Fisher did not provide Main Street Realty with a copy of the disavowal letter or her handwritten assurance to Hasner that he would be paid his commission on the Tierra Vista project.

The pending sales transaction forms — used by Main Street Realty to track the money received and expended by the company in real estate transactions — did not reflect that Hasner was to receive a commission for the Tierra Vista property. The forms did reflect, however, that Hasner was to receive a referral fee for the Chelsea Commons property. As a result, Black wrote Hasner a check for his referral fee from the Chelsea Commons project. Upon Hasner's request, the check was sent to him by Federal Express. Later, after Black learned of the disavowal letter, she sought the return of Hasner's commission.

On 18 February 2000, the FBI interviewed Fisher at her home. Fisher stated that she had not paid Hasner a fee from the Chelsea Commons transaction, had not directed anyone to pay Hasner a fee from the transaction, and had no side agreement to share her brokerage fee with Hasner. On 28 February 2000, Fisher was re-interviewed by an FBI agent and largely repeated her previous statements.

On 8 May 2001, a grand jury returned an indictment against Hasner and Fisher. Count One charged Hasner and Fisher with conspiring to deprive the Palm Beach County Housing Finance Authority ("HFA") of Hasner's honest

services and to acquire money and property through fraudulent misrepresentations, in violation of 18 U.S.C. §§ 1341, 1346.

Count Two charged Hasner and Fisher with mail fraud relating to Hasner's receipt of a check from the Chelsea Commons project, sent via Federal Express, in violation of 18 U.S.C. § 1341. Counts Three through Six charged Hasner and Fisher with additional counts of mail fraud relating to Fisher's consulting contract with HFA.

Count Seven charged Hasner with money laundering, in violation of 18 U.S.C. § 1957, and Count Eight charged Fisher with having made false statements to an investigating agent, in violation of 18 U.S.C. § 1001. The jury convicted Hasner and Fisher of all counts on special verdicts.[3]

At sentencing, Fisher argued that the appropriate guideline to establish her base offense level was U.S.S.G. § 2C1.3, the guideline pertaining to conflicts of interest, rather than U.S.S.G. § 2C1.7, which pertains to fraud involving the deprivation of the intangible right to honest

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3. The district court granted Hasner and Fisher partial relief from their conspiracy convictions. The district court concluded that insufficient evidence was in the record for a reasonable jury to conclude that Main Street Realty had been defrauded. The district court therefore granted Defendants' motion for a judgment of acquittal on the conspiracy count to the extent that it related to the fraud upon Main Street Realty. The district court, however, did not dismiss Count One, upholding the conviction of the conspiracy charge on the "honest services" facet of the conspiracy. The government does not appeal the district court's partial judgment of acquittal.

services. Fisher further objected to an obstruction-of-justice enhancement based upon her testimony at trial.

The district court sustained Fisher's challenge to the obstruction-of-justice enhancement. The district court determined that U.S.S.G. § 2C1.3 was the appropriate guideline to establish the base offense level because the gravamen of the misconduct was the concealment of Hasner's financial interest. The district court concluded, however, that an offense level of six, with a sentencing range of 0-6 months "trivialized" the misconduct; and the court imposed a four-level upward departure, resulting in a sentencing range of 6-12 months. The district court imposed a six-month sentence.

In a similar way, at Hasner's sentencing, the district court applied U.S.S.G. § 2C1.3, resulting in a 14-month sentence.

Hasner and Fisher appeal their convictions. Fisher appeals her sentence. The Government cross-appeals Hasner and Fisher's sentences.

II. DISCUSSION

A. *Vagueness*

Defendants argue that the "honest services" charges are unconstitutionally vague and fail to set boundaries for prosecutorial discretion. Defendants assert that 18 U.S.C. § 1346, the "honest services amendment" to the mail fraud statute, provides no notice as to what conduct is prohibited. Defendants contend that the district court erred by allowing

the government to bring criminal charges based upon previously undefined conduct that had only been vaguely addressed by state civil statutes.

Because Defendants' void-for-vagueness challenge to section 1346 does not raise a First Amendment issue, we review section 1346 only as applied in the instant case. *See United States v. Waymer*, 55 F.3d 564, 568 (11th Cir. 1995). A statute is unconstitutionally vague if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 103 S.Ct. 1855 (1983).

The constitutionality of a vague statutory standard is closely related to whether the standard incorporates a *mens rea* requirement. *Waymer*, 55 F.3d at 568. "A statutory requirement that an act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Id.* (internal quotation omitted).

In this case, to convict the Defendants of mail fraud, the government was required to prove specific intent to defraud. 18 U.S.C. §§ 1341, 1346. As we will discuss, Defendants' convictions were not based upon the Florida statutes; and the jury concluded that Defendants specifically intended to deprive the public of Hasner's honest services. *See generally Waymer*, 55 F.3d at 568. Accordingly, we conclude that

section 1346 was not unconstitutionally vague as applied to Defendants.

B. *Sufficiency of the Indictment/Constructive Amendment*

Defendants argue that the indictment improperly based the criminal violations on state ethics statutes which have not been similarly applied and have no criminal or civil penalties. Defendants further argue that the district court constructively amended the indictment by not requiring the government to prove a violation of state ethics law.

"A constructive amendment to the indictment occurs where the jury instructions so modify the elements of the offense charged that the defendant may have been convicted on a ground not alleged by the indictment." *United States v. Descent*, 292 F.3d 703, 706 (11th Cir. 2002) (quoting *United States v. Poarch*, 878 F.2d 1355, 1358 (11th Cir. 1989), *cert. denied*, 123 S.Ct. 913 (2003)). Mere surplusage, however, may be deleted from an indictment without error. *United States v. Cancelliere*, 69 F.3d 1116, 1121 (11th Cir. 1995), *as amended on clarification* (2 February 1996).

"To establish a violation of sections 1341 and 1346, the Government must prove that the defendants (1) intentionally participated in a scheme or artifice to defraud and (2) used the United States mails to carry out that scheme or artifice." *United States v. Lopez-Lukis*, 102 F.3d 1164, 1168 (11th Cir. 1997) (internal quotations omitted). Proof of a state law violation is not required for a conviction of honest services fraud. *Cf. Langford v. Rite Aid of Alabama, Inc.*, 231 F.3d 1308, 1312-13 (11th Cir. 2000) (concluding that duty to

disclose information for purposes of mail fraud statute can be found even in the absence of a statute or regulation); *see also United States v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (private-sector, honest services fraud).

Although the indictment listed the state ethics statutes which purportedly prohibited Hasner from receiving the Chelsea Commons commission, the indictment did not rely upon violations of these state statutes as a basis for the honest services charges. Instead, the indictment focused on Hasner's unjust enrichment while he served as chairman of the HFA and on the concealment of Hasner's financial relationship with Fisher. Because the inclusion of the state statutes in the indictment was mere "surplusage," the district court's redaction of these statutes did not result in an impermissible broadening of the indictment.[4]

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4. Because we conclude that the inclusion of the state ethics statutes in the indictment was surplusage and that the district court did not constructively amend the indictment, it is unnecessary to address Defendants' arguments that honest services charges could not be premised on the three state ethics statutes. The district court similarly did not err by refusing to instruct the jury on these statutes. Finally, because a showing that Hasner complied with Fla. Stat. § 159.606 was immaterial to the conclusion of whether Hasner intended to deprive the public of his honest services, the district court did not abuse its discretion by refusing to admit expert testimony interpreting Fla. Stat. § 159.606. Although defendants assert that government witnesses (lawyers for the bond deal) testified about Fla. Stat. § 159.606, the record reflects that these witnesses did so in the context of explaining why they refused to certify the bond issuance unless Hasner disavowed his interests in the Chelsea Commons project, including his referral fee.

C. *Jurisdiction*

Defendants contend that the government failed to demonstrate a sufficient connection to interstate commerce for the mail fraud and conspiracy counts, which are based upon Hasner's receipt of a check through Federal Express. Defendants assert that, because the check involved in these counts was sent by Federal Express and was an intrastate delivery, the government failed to establish jurisdiction.

In 1994, Congress amended the mail fraud statute to include mail sent by "private or commercial interstate carrier[s]." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 250006, 108 Stat. 1796, 2087. At trial, the parties stipulated that Federal Express was an interstate carrier. We conclude that Congress properly exercised its power under the Commerce Clause. U.S. Const. art. I, § 8, cl. 3 by regulating private and commercial carriers as instrumentalities of interstate commerce — even though the conduct took place entirely intrastate. *See United States v. Gil*, 297 F.3d 93, 100 (2d Cir. 2002) (concluding that private and commercial interstate carriers, which carry mailings between and among states and countries, are instrumentalities of interstate commerce, notwithstanding the fact that they also deliver mailings intrastate); *United States v. Photo-grammetric Data Servs., Inc.*, 259 F.3d 229, 249-52 (4th Cir. 2001), *cert. denied*, 122 S.Ct. 1295 (2002) (concluding that private and commercial interstate carriers are instrumentalities of interstate commerce, which Congress can regulate and protect from harm, even where the conduct at issue was intrastate). Accordingly, the district court had jurisdiction over the mail fraud charges against Defendants.

Appendix A

D. *Sufficiency of the Evidence*

Defendants argue that insufficient evidence supports their honest services convictions. In reviewing a conviction for sufficiency of the evidence, we determine whether "a reasonable jury, viewing the evidence and all reasonable inferences therefrom in the light most favorable to the government could find the defendant[s] guilty as charged beyond a reasonable doubt." *United States v. Poirier*, 321 F.3d 1024, 1032 (11th Cir. 2003) (internal quotation omitted), *petition for cert. filed*, (2 July 2003).

1. *The Consulting Contract: Counts 1, 3-6*

Defendants assert that the government did not prove a deprivation of "honest services" with respect to Fisher's consulting contract. Defendants contend that the undisputed facts at trial reflect that, before Hasner recommended that the HFA enter into a consulting contract with Fisher, Hasner and Fisher had no conversations about a potential real estate commission from Chelsea Commons. Defendants assert that the only real estate related conversations occurred after the consulting agreement was approved, but before the HFA voted on the $2,500 cap for reimbursement of Fisher's potential expenses under the contract. Defendants further assert that the government presented no evidence that they had the specific intent to deprive the HFA of Hasner's honest services, no evidence that there was a cognizable harm, and no evidence that the mailings were made in furtherance of the scheme to defraud.

Appendix A

Section 1341 proscribes use of the mails as part of a "scheme or artifice to defraud." 18 U.S.C. § 1341 (1994). Section 1346 defines "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."

"Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public's best interest." *deVegter*, 198 F.3d at 1328. When a public official, instead, secretly makes decisions based on his own personal interests, the official defrauds the public of his honest services. *See Lopez-Lukis*, 102 F.3d at 1169. "A defendant's breach of a fiduciary duty may be a predicate for a violation of the mail fraud statute where the breach entails the violation of a duty to disclose material information." *Waymer*, 55 F.3d at 571.

A reasonable jury could conclude that Hasner breached his fiduciary duties by voting on Fisher's consulting contract without disclosing the agreement he had with Fisher to receive a referral fee, if the Chelsea Commons real estate transaction was completed. Hasner proposed Fisher's consulting contract to the HFA in September 1996: before Fisher sought Hasner's help in locating property for the Chelsea Commons project. Fisher's contract, however, was not approved by the HFA in its final form until 18 November 1996: after the Chelsea Commons proposal had been submitted to the HFA and after Fisher and Fleming had agreed to pay Hasner a referral fee if the real estate transaction was completed. Because Hasner, by voting on Fisher's contract, was taking discretionary action that directly benefited Fisher, Hasner's agreement with Fisher to share the commission from the Chelsea Commons project was material.

Furthermore, the evidence at trial, including the wiretaps, indicated that Fisher and Hasner later took steps to conceal Hasner's interest in the Chelsea Commons project. When an HFA member expressed concern about potential conflicts on the Chelsea Commons project, Hasner did not disagree with Ellington's representation — made in Hasner's presence — to the HFA that the conflict had to do with Hasner's interest in his brothers' construction company. When Hasner's $9,000 referral fee was included in the HUD-1, Hasner's brother, calling Fisher on Hasner's behalf, commented to Fisher "Lloyd thought everything was going to be quiet." Fisher later acknowledged that the inclusion of the referral fee was "a major, major blunder."

In the light of the evidence and Hasner's failure to disclose the real estate commission he would receive if the property for the Chelsea Commons project was sold, a reasonable jury could conclude that Hasner possessed the requisite intent to deprive the HFA of his honest services by using his discretionary authority to vote in favor of Fisher's consulting contract.

A reasonable jury could also conclude that Fisher possessed the requisite intent to deprive the HFA of Hasner's honest services. Fisher testified that she "had no clue" that Hasner's vote on her consulting contract was subject to disclosure or recusal requirements and that she did not attempt to influence Hasner's vote. But the jury was free to reject this testimony. Based upon the evidence and Fisher's testimony, the jury was free to infer that the opposite of Fisher's testimony was true and conclude that Fisher intended to influence Hasner's honest services. *See United States v.*

Mejia, 82 F.3d 1032, 1038 (11th Cir. 1996) ("A proper inference the jury can make from disbelieved testimony is that the opposite of the testimony is true"); *United States v. Brown*, 53 F.3d 312, 314-15 (11th Cir.1995) (defendant's explanations at trial can actually increase amount of evidence supporting guilty verdict).

Although Defendants argue that the government failed to demonstrate a cognizable harm because the consulting contract and Chelsea Commons projects both furthered the public good, the harm was to the public's intangible (but very real) right to honest and impartial government. *See Lopez-Lukis*, 102 F.3d at 1168.

The government also established the requisite "mailing" to support Defendants' convictions. Although "mailing" is a required element of mail fraud, the use of the mails need not be an essential element of the scheme. *See United States v. Paradies*, 98 F.3d 1266, 1282 n. 29 (11th Cir.1996). Here, the fraud in this case did not achieve fruition until Fisher received the checks from the ill-obtained contract. Thus, the government established the required mailing element.

2. *Counts 1 and 2*

Defendants argue that, for the Chelsea Commons project, the Government failed to prove that Hasner's "honest services" were corrupted or that Fisher intended to deprive anyone of Hasner's "honest services." Defendants note that Hasner recused himself from voting on any matter relating to Chelsea Commons. Defendants assert that, because Hasner did not engage in *any* official act for Chelsea Commons,

no deprivation of Hasner's honest services resulted. Fisher also asserts that she had no duty to disclose or to clarify any conflict that Hasner may have had and that no evidence was presented that she intended to deprive the HFA of Hasner's honest services.

A government official may be guilty of honest services fraud if he withholds material information. *See Waymer*, 55 F.3d at 572. Although Hasner filed conflict of interest forms and refrained from voting on the Chelsea Commons project, the record reflects that Hasner concealed material information (his financial stake) from the HFA.

The conflict of interest forms stated that Hasner had a potential conflict of interest, but provided no details. At the 2 June 1997 meeting, at which HFA members gave their final approval to the Chelsea Commons project, an HFA member specifically asked about conflicts in the project. In Hasner and Fisher's presence, Ellington informed the HFA that Hasner, at one time, had thought that he might be the contractor for the Chelsea Commons project. Ellington informed the HFA that, although Hasner was not going to be the contractor, Hasner was going to continue to refrain from voting on the project. Ellington stated that he did not know of other disclosures that needed to be made. Hasner did not correct Ellington's statement or inform the HFA of the real estate commission agreement between Fisher and him.

By failing to disclose the commission that he would receive, Hasner prevented the HFA from making a fully informed decision, and he potentially placed the bond issuance in jeopardy. At the bond closing, the attorneys,

who were required to warrant that the Chelsea Commons project was being financed in accordance with Florida law, refused to approve the issuance of the bonds without Hasner disavowing his commission. Although Hasner signed a letter disclaiming the real estate fee and claiming that the inclusion of the disbursement to Hasner Realty in the closing statement was a mistake, Defendants, in reality, ensured that Hasner would receive his fee.

Although it is perhaps true that Fisher had no duty to disclose Hasner's conflict of interest, the jury, in the light of the evidence and Fisher's testimony, was also free to disbelieve Fisher's testimony that the commission on the Chelsea Commons project was not in exchange for Hasner's vote on her consulting contract. *See Brown*, 53 F.3d at 314-15 (a statement by a defendant, if disbelieved by the jury, may be considered as substantive evidence of the defendant's guilt).

Based upon the evidence presented at trial, a reasonable jury could conclude that Hasner and Fisher sought to deprive the HFA of Hasner's honest services.[5]

3. *Count Eight — False Statement*

Fisher argues that the government failed to meet its burden of establishing that her alleged false statement —

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5. Hasner argues that, because the money laundering count was based upon a flawed, honest services theory, the government's failure to establish an honest services case mandates a judgment of acquittal as to the money laundering charges. Because we uphold the honest services charges, this argument is without merit.

the indictment focused on Fisher's second interview with the FBI — to investigators was material. Fisher contends that her pertinent statement could not have influenced the Chelsea Commons investigation because (1) the government admitted no investigative purpose supported the purpose for the interview; (2) her statement repeated the statement that she gave at an earlier interview; and (3) no evidence was presented that her statement was capable of influencing the government's investigation.

"A statement is material if it has a natural tendency to influence or the capability to influence government action." *United States v. Johnson*, 139 F.3d 1359, 1363 (11th Cir. 1998). The government is not required to show actual reliance on a statement for it to be material; instead, a false statement "must simply have the capacity to impair or pervert the functioning of a government agency." *See United States v. Calhoon*, 97 F.3d 518, 530 (11th Cir.1996).

Although Fisher asserts that her pertinent statements cannot be material because they repeated her earlier statements to the FBI, her false statements during the second interview were a continued effort to impede the FBI investigation. In addition, although Fisher testified that her statements were not false (because she was unaware that the notation line on Hasner's commission check identified Chelsea Commons), the evidence at trial, including Fisher's own testimony, was sufficient for the jury to conclude that Fisher knew the statements to the FBI were false. *Brown*, 53 F.3d at 314-15.

Appendix A

E. *Admission of Co-Conspirator's Statements*

Defendants argue that the wiretap tapes were inadmissible because no foundation for their admission was established under Fed.R.Evid. 801(d)(2)(E). Defendants contend that the 1997 amendments to Fed.R.Evid. 801(d)(2)(E) invalidated the discretion courts previously had to admit provisionally co-conspirator statements. Defendants also contend that, even at the end of the trial, insufficient evidence existed to admit the tapes.

We review the district court's evidentiary rulings for an abuse of discretion. *See United States v. Hands*, 184 F.3d 1322, 1326 (11th Cir.1999) *amended by* 194 F.3d 1186 (11th Cir.1999), *cert. denied*, 123 S.Ct. 712 (2002).

Under Rule 801(d)(2)(E), statements of co-conspirators made during the course and in furtherance of the conspiracy are not hearsay. For evidence to be admissible under Rule 801(d)(2)(E), the government must prove by a preponderance of the evidence these things: (1) a conspiracy existed; (2) the conspiracy included the declarant and the defendant against whom the statement is offered; and (3) the statement was made during the course and in furtherance of the conspiracy. In determining the admissibility of co-conspirator statements, the trial court may consider both the co-conspirator's statements and independent external evidence. *United States v. Miles*, 290 F.3d 1341, 1351 (11th Cir. 2002), *cert. denied*, 123 S.Ct. 707 (2002).

Appendix A

Co-conspirator statements can be provisionally admitted subject to the government "connecting them up" with sufficient evidence. *United States v. Allison*, 908 F.2d 1531, 1533-34 (11th Cir. 1990). Contrary to Defendants' assertions, the 1997 amendment to Fed.R.Evid. 801(d)(2)(E) did not change this situation. Instead, the stated purpose of the 1997 Amendment was to codify three issues raised by *Bourjaily v. United States*, 107 S.Ct. 2775 (1987). *See* Fed.R.Evid. 801(d)(2)(E) advisory committee's notes. The advisory committee notes state that the amendment (1) codifies the holding of *Bourjaily* by expressly requiring that courts consider the contents of the co-conspirator's statement in determining the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered; (2) provides that the contents of the statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated; and (3) extends the reasoning of *Bourjaily* to subdivisions (C) and (D) of Rule 801(d)(2). Neither *Bourjaily* nor the amendment to Fed.R.Evid. 801(d)(2)(E) addresses the issue of whether district courts may provisionally admit co-conspirators' statements. Accordingly, the district court properly admitted the wiretap evidence on a provisional basis.

Furthermore, the government established by a preponderance of the evidence that Fisher and Hasner were involved in a conspiracy. The independent evidence reflected that, when Hasner voted on Fisher's consulting contract at the 18 November 1996 HFA meeting, Hasner and Fisher had reached an agreement for Hasner to receive a referral fee if the sale of the Chelsea Commons property was completed. The independent evidence also reflected that Hasner did not

disclose this fee to the HFA when voting on Fisher's consulting contract or when later asked about his Chelsea Commons conflict by the HFA. Because sufficient evidence supports the district court's admission of the wiretap evidence as co-conspirator's statements, the district court did not abuse its discretion by admitting this evidence.

F. *Closing Arguments*

Defendants argue that the district court erred by denying their motion for a mistrial based upon the prosecutor's improper remarks during closing arguments. Defendants contend that the prosecutor seized upon the emotions of the 11 September 2001 tragedy to inflame the jury.

The purpose of closing arguments is to assist the jury in analyzing the evidence. *See United States v. Iglesias*, 915 F.2d 1524, 1529 (11th Cir. 1990). "Prosecutorial misconduct is a basis for reversing an appellant's conviction only if, in the context of the entire trial in light of any curative instruction, the misconduct may have prejudiced the substantial rights of the accused." *United States v. Bailey*, 123 F.3d 1381, 1400 (11th Cir. 1997) (quoting *United States v. Lopez*, 898 F.2d 1505, 1511 (11th Cir. 1990)).

During closing arguments, the prosecutor stated:

> That's not what the United States is all about. That's not what democracy is all about. Democracy is about full honest disclosures in a public forum. Allowing people to debate the

> merits of an issue knowing all the facts. It's the antithesis of democracy.

Defendants did not object. Defendants did object, however, when the prosecutor thereafter stated:

> Secrets and democracy do not go hand in hand. They are the antithesis of each other.

The district court denied Defendants' motion for a mistrial and instructed the jury to disregard the references to democracy. The prosecutor later added these words:

> You are the representatives of the public. You with your verdict will expose this corruption and bring it to light.

Defendants again requested a mistrial. The district court denied the motion and instructed the jury to disregard the statement.

In the light of the evidence and the district court's curative instructions, Defendants failed to demonstrate that the government's comments prejudiced their substantial rights. Accordingly, the district court did not err by denying Defendants' motion for a mistrial.

Appendix A

G. *Sentencing*

1. *Base Offense Guideline*

Fisher argues that the district court erred by imposing a four-level enhancement under Note 15 of U.S.S.G. § 2B1.1: the guideline applicable to false statement offenses. Fisher contends that the district court should have applied the guideline applicable to honest services offenses, U.S.S.G. § 2C1.3.

The government agrees that the district court's enhancement was "unguided and seemingly haphazard."[6] In its cross appeal, the government contends that the district court erred by applying section 2C1.3 instead of section 2C1.7 to determine Defendants' base offense level.

We review *de novo* the district court's interpretation and application of the Sentencing Guidelines and review the factual findings underlying decisions for clear error. *United States v. Pistone*, 177 F.3d 957, 958 (11th Cir.1999).

The Statutory Index lists both section 2B1.1 and section 2C1.7 as applicable to convictions under 18 U.S.C. § 1341. *See* U.S.S.G.App. A. Section 2C1.7 of the Sentencing

6. The government argues that this Court could affirm because the district court could have imposed the same sentence even without the "upward departure." The enhancement increased Fisher's guideline range from 0-6 months to 6 to 12 months. The district court did not explicitly say it would have imposed the same sentence without the enhancement; we will consider the merits of Fisher's claims.

Guidelines provides for a base offense level of 10 for fraud involving the deprivation of the intangible right to the honest services of public officials. U.S.S.G. § 2C1.7. Section 2B1.1 of the Sentencing Guidelines provides for a base offense level of six for various theft crimes. Between guideline sections 2B1.1 and 2C1.7, section 2C1.7 is the most applicable to the offense of conviction.

Section 2C1.7(c)(4) provides that — if the offense is covered more specifically under section 2C1.3, the guideline section applicable to conflict of interest offenses — the sentencing court should apply section 2C1.3. Because the offenses at issue essentially involve Hasner's failure to disclose his conflicts of interest, the district court did not clearly err by applying section 2C1.3 to Fisher and Hasner's offenses.

The district court, however, did err by relying on section 2B1.1 to enhance Fisher's sentence. Section 2C1.3 provides no cross-reference to section 2B1.1. Accordingly, we vacate Fisher's sentence and remand for resentencing.

2. *Obstruction of Justice*

The government argues in its cross-appeal that the district court erred by failing to apply an obstruction-of-justice enhancement to Fisher's sentence. The government asserts that it identified three instances of Fisher's perjury at trial that were material: (1) her denial that she sought to conceal from HFA and Main Street Realty her agreement with Hasner to compensate him; (2) her contention that Hasner's fee

agreement had been disclosed to the HFA; and (3) her statement that Hasner had earned a commission for his participation in the Tierra Vista transaction.

We review the district court's application of U.S.S.G. § 3C1.1 to the facts *de novo*. *United States v. Singh*, 291 F.3d 756, 763 (11th Cir.2002).

Section 3C1.1 of the Sentencing Guidelines provides for a two-level increase in a defendant's base offense level if:

> (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense.

U.S.S.G. § 3C1.1. "Perjury under oath on material matters, not due to confusion or mistake," justifies an obstruction-of-justice enhancement. *United States v. Hubert*, 138 F.3d 912, 915 (11th Cir.1998).

We cannot say that the district court clearly erred by refusing to enhance Fisher's base offense level for obstruction of justice pursuant to U.S.S.G. § 3C1.1. We have said that "[w]ith only a cold, paper record before it, an appellate court is severely hindered in evaluating whether a defendant perjured himself at trial. The district court is uniquely suited to make such a determination because it heard all the evidence

and was able to observe a particular witness' demeanor and behavior on the witness stand." *United States v. McDonald*, 935 F.2d 1212, 1219 (11th Cir.1991). Although the government was able to impeach Fisher's testimony, we cannot say that the inconsistencies required an upward adjustment.

III. CONCLUSION

For the foregoing reasons, we AFFIRM Defendants' convictions. We also AFFIRM Hasner's sentence. We VACATE Fisher's sentence and REMAND for further proceedings.

APPENDIX B — OMNIBUS ORDER ON MOTIONS OF JUDGMENT OF ACQUITTAL OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED DECEMBER 18, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-8069-CR-DIMITROULEAS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LISA FISHER,

Defendant.

OMNIBUS ORDER

THIS CAUSE having been heard upon Defendant Fisher's November 23, 2001 Motions For New Trial (co-conspirator statements) [DE-273]; For New Trial (Constructive Amendment) [DE-274]; For New Trial (Honest Services - Brody) [DE-275]; For Judgment of Acquittal (Tenth Amendment) [DE-276]; For Judgment of Acquittal (Honest Services, Cts. 1-6) [DE-277]; For Judgment of Acquittal (Main Street, Cts. 1-6) [DE-278]; For Judgment of Acquittal (Mailings, Cts. 3-6) [DE-279]; For Judgment of Acquittal (Count 8) [DE-280]; For Judgment of Acquittal (Honest Services) [DE-281]; For Oral Argument [DE-282]; and Defendant Fisher's November 27, 2001 Corrected Motion For Judgment of Acquittal (Count 8) [DE-283], and

the Court having reviewed the Government's December 11, 2001 Omnibus Response [DE-292] and the Court having reviewed Fisher's December 14, 2001 Reply [DE-300] and the Court having presided over the trial of this cause, finds as follows:

1. A liberal standard is employed in determining whether a statement is made in furtherance of a conspiracy. *U.S. v. Dickerson*, 248 F.3d 1036 (11th Cir. 2001). By a preponderance of the evidence, it was shown that the Hasner statements were made in furtherance of a conspiracy that involved Lisa Fisher at the time they were made. *U.S. v. Vigneau*, 187 F.3d 82, 88 (1st Cir. 1999). Circumstantially, it had been shown that Lisa Fisher was part of the conspiracy at the time Brandt was asked the questions. *U.S. v. Diaz*, 190 F.3d 1247 (11th Cir. 1999). Moreover, a provisional admittance of such statements is harmless error where the evidence later establishes the admissibility. *U.S. v. Emuegbunam*, 268 F.3d 377, 395 (6th Cir. 2001), *U.S. v. Portela*, 167 F.3d 687, 702-03 (1st Cir. 1999), *U.S. v. Allison*, 908 F.2d 1531 (11th Cir. 1990); *U.S. v. Cross*, 928 F. 2d 1030, 1052 (11th Cir. 1991). The Government later connected up the statements. *U.S. v. Norton*, 755 F.2d 1428 (11th Cir. 1985). A failure to renew objections to co-conspirator statements and a failure to move to strike them may waive the complaint. *U.S. v. Haynie*, 179 F.3d 1048, 1050 (7th Cir. 1999). No error has been shown; the Motion for New Trial [DE-273] is Denied.

2. Striking surplusage from the indictment is not a constructive amendment of the indictment. *U.S. v. Caldwell*, 176 F.3d 898, 901 (6th Cir. 1999). The Motion For New Trial [DE-274] is DENIED.

3. The Defendant knew of the allegedly exculpatory evidence at the time of trial. *Leka v. Portuondo*, 257 F.3d 89, 98 (2d Cir. 2001). No prejudice has been shown. The result of the trial would not have been different. *U.S. v. Combs*, 267 F.3d 1167, 1175 (10th Cir. 2001). The Motion for New Trial [DE-275] is Denied.

4. Federal Express was stipulated to be an interstate commercial carrier. The statute, 18 U.S.C. § 1341, prohibits matters that are sent or delivered by any private or commercial interstate carriers. Once Federal Express was used, it mattered not that the correspondence never left the State of Florida. See, *U.S. v. Dascenzo*, 152 F.3d 1300, 1301 (11th Cir. 1998) (arson of rental property affected interstate commerce where it was an element of a much broader commercial market in rental properties). The Motion For Judgment of Acquittal [DE-276] is Denied.

5. At trial, the Court construed F.S. § 159.606 (1997), as prohibiting employees of housing finance authorities from acquiring interests in qualifying housing developments. The fact that there is no evidence that someone else has ever been prosecuted in Florida under this state statute for such a violation does not mean that the Defendants were unaware of such a violation. Moreover, "duties to disclose material information affecting an official's impartial decision-making and to recuse himself exist within this fiduciary relationship regardless of a state or local law codifying a conflict of interest." *U.S. v. Antico*, 2001 W.L. 151 1560 (3d Cir. Nov. 28, 2001). The jury rejected the good faith defense in this case. The Motion for Judgment of Acquittal [DE-277] is Denied.

6. The evidence that Main Street Realty was defrauded was not overwhelming in the Court's mind. There was insufficient evidence in the record for a reasonable jury to reach that conclusion. *U.S. v. Ward*, 197 F.3d 1076 (11th Cir. 1999). This was a jury trial, the Court would not normally second-guess the jury at this point. Examining all evidence; however, the Motion for Judgment of Acquittal [DE-278] is Denied, because there was sufficient evidence of "honest services" as to Fisher and Hasner.

7. There was circumstantial evidence that Fisher's consulting contract was a *quid pro quo* for Hasner's real estate commission. The Motion for Judgment of Acquittal [DE-279] is Denied.

8. There was sufficient evidence to prove that Fisher's statement to Agent Danik on February 28, 2000 was materially false, and she knew it to be so. *U.S. v. White*, 270 F. 3d 356 (6th Cir. 2001). The Motion for Judgment of Acquittal [DE-280] is Denied.

9. There was evidence that Lisa Fisher assisted Defendant Hasner in defrauding the Housing Finance Authority of his honest services. Had Hasner disclosed his conflict, the Housing Finance Authority would not have allowed the project to be completed. It was reasonable for the jury to conclude that Hasners volte on Fisher's consulting contract was contingent upon her later assisting him in receiving a real estate commission. The question of intent was properly decided by the jury. The Motion for Judgment of Acquittal [DE-281] is Denied.

Appendix B

10. The Request for Oral Argument [DE-282] is Denied.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 18 day of December, 2001.

s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

APPENDIX C — ORDER DENYING MOTION TO DISMISS COUNTS I AND II OF THE INDICTMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA FILED AUGUST 31, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-8069-CR-DIMITROULEAS

UNITED STATES OF AMERICA.

Plaintiff,

vs.

LISA FISHER,

Defendant.

ORDER DENYING MOTION TO DISMISS COUNTS I AND II

THIS CAUSE having come before the Court on the Defendant's August 6, 2001 Motion To Dismiss Counts I and II[1] [DE-106], and the Court having reviewed the Government's August 20, 2001 Response [DE-143] and Defendant's August 30, 2001 Reply, and the Court being otherwise fully advised, finds as follows:

1. Factual matters may be developed at trial that establish this court's jurisdiction. For example, it may be

1. Said motion was adopted by Defendant Hasner [DE-122] and Defendant Ellington [DE-130].

established that packages from Orlando to Delray Beach physically travel via Memphis, Tennessee or it may be established that messages electronically are routed or transmitted through Memphis. See *U.S. v. Kammusell*, 196 F.3d 1137 (10th Cir. 1999); *U.S. v. Gilbert*, 181 F.3d 152 (1st Cir. 1999). Alternatively, it may be established that a depletion of assets of the realty company had an effect on interstate commerce. *U.S. v. Rodriguez*, 218 F.3d 1243 (11th Cir. 2000) *cert denied*, 121 S. Ct. 832 (2001); *U.S. v. Gray*, __ F.3d __, 2001 WL 883527 (11th Cir. Aug. 7, 2001).

2. Intrastate use of Western Union has been held sufficient to constitute interstate commerce. *U.S. v. Marek*, 238 F.3d 310, 317 (5th Cir. 2001) *cert. requested*, 69 USLW 3673 (2001), *see also, U.S. v. Photogrammatice Data Services, Inc.*, __ F.3d __ 2001 W.L. 85586 (4th Cir. July 30, 2001). However, the Court need not address the Western Union or other precedent at this tune, as factually the court may not have to address that purely legal issue.

Wherefore, it is ORDERED AND ADJUDGED that the Motion to Dismiss Counts I and II is Denied, without prejudice to renew in a Rule 29 motion, if appropriate.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 31 day of August, 2001.

s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

APPENDIX D — ORDER DENYING REQUEST FOR RECONSIDERATION OF MOTION TO STRIKE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED SEPTEMBER 21, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-8069-CR-DIMITROULEAS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LLOYD HASNER, LISA FISHER, and RICHARD ELLINGTON,

Defendants.

ORDER

THIS CAUSE having come on to be heard on Defendant Lisa Fisher's Request for Reconsideration of her Motion to Strike All Deprivation of Honest Services Allegations in Counts 1 through 6 of the Indictment [DE-176], Ellington's September 19, 2001 Reconsideration and Motion to Adopt, Government's response [DE-184], and Fisher's Reply, and having heard arguments on September 21, 2001 and being otherwise fully advised in the premises, it is

HEREBY ORDERED AND ADJUDGED that the Motion for Reconsideration of Defendant Fisher's Motion to Strike All Deprivation of Honest Services Allegations in

Appendix D

Counts 1 through 6 of the indictment is Denied. The Court adheres to its prior ruling [DE-165] for the reasons stated therein. Ellington's Motion to Adopt is Granted, Ellington's Request for Reconsideration is Denied.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 21 day of September, 2001.

s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

APPENDIX E — ORDER DENYING MOTION TO DISMISS BECAUSE OF DELAY OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED SEPTEMBER 7, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-8069-CR-DIMITROULEAS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LLOYD HASNER, LISA FISHER and
RICHARD ELLINGTON,

Defendants.

ORDER

THIS CAUSE having come before the Court on the Defendant Ellington's August 6, 2001 Motion to Dismiss (Delay) [DE-103], and the Court having received and reviewed the Government's Response [DE-142], Defendant Hasner's Motion to Adopt [DE-122], Defendant Fisher's Motion to Adopt [DE-125] and Defendant Ellington's August 31, 2001 Reply [DE-153], the Court finds as follows:

1. On or about May 27, 1997, Judge Paine signed a wiretap order; Defendant Hasner was a named interceptee.

2. On June 27, 1997, Judge Paine ordered the tapes to be sealed and delayed the notice of interception for an unspecified period of time.

3. On November 9, 2000, Judge Paine authorized the Government's making testimonial use of the interceptions.

4. On January 29, 2001, Defendant Ellington, through his attorney, was told that he was a target of the grand jury's investigation.

5. On February 5, 2001, Ellington gave statements to law enforcement officers, which are not the basis for an indictment pending in case no. 01-8078-CR-ZLOCH.

6. Ellington complains that he should have received notice of the wiretapped conversations before he voluntarily talked to law enforcement officers. He contends that his due process rights were violated.

7. Those February 5, 2001 statements are not admissible by the Government in this trial. Therefore, any prejudice to Ellington exists only in the 01-8078-CR-ZLOCH case. No concrete showing of prejudice exists in this case. *U.S. v. Hunter*, 197 F.3d 862, 865 (7th Cir. 1999).

8. Even if Ellington could show some prejudice, no relief is available where there was no deliberate action by the government designed to gain a tactical advantage. *U.S. v. Benson*, 846 F.2d 1338. 1341 (11th Cir. 1988). They were actively investigating the case. *U.S. v. McMutary*, 217 F.3d 477, 482 (7th Cir. 2000).

9. The Government has no constitutional duty to indict as soon as they have probable cause. *U.S. v. Lovasco*, 431 U.S. 783, 797 (1977); *U.S. v. Beckett*, 208 F.3d 140, 151 (3d Cir. 2000).

10. A general loss of memory is insufficient to establish proof of substantial prejudice. *U.S. v. Warren*, 772 F.2d 827, 836 (11th Cir. 1985), *cert. denied* 106 S.Ct. 1214 (1986).

Wherefore, the Motions to Dismiss because of Delay are DENIED.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 7 day of September, 2001.

s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

APPENDIX F — OMNIBUS ORDER DENYING MOTIONS TO DISMISS AND STRIKE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED SEPTEMBER 4, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 01-8069-CR-DIMITROULEAS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LISA FISHER,

Defendant.

OMNIBUS ORDER DENYING MOTIONS TO DISMISS AND STRIKE

THIS CAUSE having come before the Court on the Defendant Fisher's August 6, 2001 Motions to Strike (Money [DE-109] and Honest Services [DE-108]),Motion to Dismiss Count One [DE-105], Motion to Dismiss Counts Three through Six [DE-107] Defendant Ellington's Motion to Dismiss [DE-104] Defendant Hasner's Motion to Strike Surplusage [DE-113], and various Motions to Adopt, and the Court having received the Government's August 20, 2001 Responses [DE-136 and 139], Fisher's Reply [DE-152], and Hasner's August 31, 2001 Reply, finds as follows:

Appendix F

1. The indictment sufficiently alleges crimes, it conforms to minimal constitutional standards. *U.S. v. Gama-Bastidas*, 222 F.3d 779, 785 (10th Cir. 2000); *U.S. v. Hinton*, 222 F.3d 664, 672 (9th Cir. 2000). The factual sufficiency or insufficiency of the Government's case will be determined at trial.

2. The indictment need not allege in detail factual proof that will be ruled upon at trial. *U.S. v. Smith*, 230 F.3d 300, 306 (7th Cir. 2000). The Defendants are adequately informed of the charge. *U.S. v. Fern*, 155 F.3d 1318, 1325 (11th Cir. 1998).

3. Any surplusage in the Indictment can be rectified through instructions to the jury. *U.S. v. Caldwell*, 176 F.3d 898, 901 (6th Cir. 1999).

ORDERED AND ADJUDGED that the Court denys the above-referenced defense motions.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 4 day of September, 2001.

s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

APPENDIX G — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED JANUARY 27, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-10989-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,
Cross-Appellant,

versus

LLOYD HASNER, LISA FISHER,

Defendants-Appellants,
Cross-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __ F.2d __).

Before: EDMONDSON, Chief Judge, DUBINA, Circuit Judge and HODGES*, District Judge.

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* Honorable Wm. Terrell Hodges, United States District Judge for the Middle District of Florida, sitting by designation.

Appendix G

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ J.K. Edmondson
Chief Judge